

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

50 California Street • Suite 2600 • San Francisco, California 94111 • (415) 352-3600 • FAX: (415) 352-3606 • www.bcdc.ca.gov

August 22, 2008

TO: Commissioners and Alternates

FROM: Will Travis, Executive Director (415/352-3653 travis@bcdc.ca.gov)
Carolynn* Box, Enforcement Analyst (415/352-3624 cbox@bcdc.ca.gov)
Tim Eichenberg, Chief Counsel (415/352-3655 time@bcdc.ca.gov)

SUBJECT: Staff Recommendation Regarding Proposed Commission Stipulated Cease and Desist and Civil Penalty Order No. CCD 2-08; Pacific Marine Yachts
(For Commission consideration on September 4, 2008)

Summary and Recommendations

On November 30, 2006, BCDC staff commenced an enforcement action against Garrett O'Doherty and Pacific Marine Yachts for alleged violations of BCDC Permit No. 15-00 (the Permit). In order to resolve the enforcement action, the staff and Mr. O'Doherty have agreed to the terms and conditions of Proposed Cease and Desist and Civil Penalty Order No. CCD 2-08 (the Order). The Order would require the installation of certain public access improvements at Pier 9 in the City and County of San Francisco, the donation of additional charter cruises to nonprofit, charitable organizations, and the payment of a civil penalty of \$30,000. The staff and Mr. O'Doherty recommend that the Commission adopt and issue the Order.

This matter has not been considered by the Enforcement Committee. The Executive Director, after consulting with Chair Randolph and the members of the Enforcement Committee, decided to refer this matter directly to the Commission as provided under Section 11333 of the regulations because: the respondent has stipulated to the terms of the Order and agrees to resolve all outstanding issues; it would be difficult to schedule and hold both an Enforcement Committee and Commission hearing before the agreed-upon deadlines in the Order; and the Order would be the only matter before the Enforcement Committee and would not have been an efficient use of the Committee's time.



Making San Francisco Bay Better

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ATTACHMENT ONE

August 22, 2008

TO: Commissioners and Alternates

FROM: Will Travis, Executive Director (415/352-3653 travis@bcdc.ca.gov)
Carolynn Box, Coastal Program Analyst (415/352-3624 carolynnb@bcdc.ca.gov)
Tim Eichenberg, Chief Counsel (415/352-3655 time@bcdc.ca.gov)

SUBJECT: **Staff Recommendation Regarding Proposed Commission Stipulated Cease and Desist and Civil Penalty Order No. CCD 2-08; Pacific Marine Yachts**
(For Commission consideration on September 4, 2008)

Summary and Recommendations

The staff recommends that the Commission approve and issue the proposed Commission Stipulated Cease and Desist and Civil Penalty Order No. CCD 2-08 (the Order) to Garrett O'Doherty (Mr. O'Doherty), Pacific Marine Yachts, for the reasons stated below.

This matter arises out of an enforcement action commenced by the BCDC staff on November 30, 2006 against Mr. O'Doherty concerning compliance with BCDC Permit No. 15-00 (the Permit) authorizing a charter cruise operation at Pier 9 in the City and County of San Francisco. The parties have agreed to stipulate to the issuance of this Cease and Desist and Civil Penalty Order to avoid the delay, expense and uncertainty that would result in a formal contested Commission enforcement process and potential litigation. The stipulation provides for the installation of certain public access improvements, additional charter cruise donations for nonprofit organizations, and the payment of a \$30,000 civil penalty. If the \$30,000 civil penalty is not paid by October 31, 2008, or if additional violations of the permit occur, the stipulation provides that a total fine of \$128,500 will become due.

This matter has not been considered by the Enforcement Committee. The Executive Director, after consulting with Chair Randolph and the members of the Enforcement Committee, decided to refer this matter directly to the Commission as provided under Section 11333 of the regulations because: the respondent has stipulated to the terms of the Order and to



Bay Conservation and Development Commission

resolve all outstanding issues; it would be difficult to schedule and hold both an Enforcement Committee and Commission hearing before the agreed-upon deadlines in the Order; and the Order would be the only matter before the Enforcement Committee and would not have been an efficient use of the Committee's time.

The staff has determined that the proposed Order is a fair resolution of the alleged violations.

Staff Report

Permit History

On March 7, 2001, the Commission issued Permit No. 15-00 to Pacific Marine Yachts and the Port of San Francisco authorizing: (1) the installation, use, and maintenance of 6,664 square feet of landings, ramps and floats to support three charter cruise vessels, and mooring and use of three charter vessels ranging in size from 150 feet long, 100 feet long, and 75 feet long in the Bay; (2) the installation, use, and maintenance of an approximately 2,005-square-foot public access area located on the north side of the Pier 9 pier shed, and an approximately 1,725-square-foot public access area located on the south side of the Pier 9 pier shed; (3) installation, use, and maintenance of an approximately 1,120-square-foot component of the Bayside History Walk through the southeast portion of the Pier 9 bulkhead building and breezeway in the shoreline band; and (4) installation, use, and maintenance of tenant improvements for a charter cruise business office space in a 7,700-square-foot portion of the southeast part of the Pier 9 bulkhead and pier shed building in the shoreline band.

A number of Special Conditions in the Permit require Pacific Marine Yachts to do the following prior to the use of any structures, floats, ramps, or landings for charter yachts excursions: Special Condition II-A-1 requires the approval of specific plans, including Bayside History Walk plans, public access plans, and mooring plans; Special Conditions II-B-2 and II-B-3 require Pacific Marine Yachts to secure BCDC staff approval of an instrument to dedicate unrestricted public access to 2,940 square feet of the exterior area (1,740 square feet on the North Wharf and 1,200 square feet on the South Apron) and a 320-square-foot portion of the Bayside History Walk (Breezeway); Special Conditions II-B-5 and II-B-6 require Pacific Marine Yachts to install public access improvements on the North and South side of Pier 9, including six benches, approximately 15 bollards, two trash receptacles, two public access signs, and one "no bus parking" sign; Special Condition II-B-7 requires Pacific Marine Yachts to install improvements to the Bayside History Walk at Pier 9, including an approximately 9 to 10-foot-wide breezeway with interpretive amenities including historical photographs, explanatory text, and maritime artifacts displayed throughout the breezeway, a walkway inside the Pier 9 shed that connects the Breezeway and Herb Caen Way, and at least two Bayside History Walk signs at each entry to the Bayside History Walk; Special Condition II-B-11 requires Pacific Marine Yachts to organize and administer an outreach program for nonprofit, charitable organizations with four complimentary cruises for 50 guests on a quarterly basis; Special Condition II-B-12 requires Pacific Marine Yachts to submit yearly reports to BCDC staff that summarize the complimentary cruise efforts for each year; and Special Condition II-G requires Pacific Marine Yachts to secure BCDC staff approval of a plan to place flags, banners and signs on Pier 9.

The Permit was amended (Amendment No. One) on December 28, 2007 to authorize the following: (1) installation, use, and maintenance of two gates on the north and south side of the Breezeway; and (2) replacement, use, and maintenance of the roll-up door at the Pier 9 shed entrance on Herb Caen Way. Amendment No. One added Special Condition II-B-4 to limit the use of both interior Bayside History areas (the breezeway and interior pathway) from 8 a.m. to 6 p.m. As a result, Special Condition II-B-7 was amended to require the Bayside History Walk signs to include that the areas are available from 8 a.m. to 6 p.m.

Alleged Violations and Settlement

The staff visited the site and, based on observations and a review of the permit file, issued a violation letter on November 30, 2006 notifying Mr. O'Doherty that in order to avoid civil penalties, he had until January 4, 2007 to correct the following alleged violations: (1) failure to submit plans for public access and the Bayside History Walk; (2) failure to dedicate approximately 2,940-square-feet of exterior public access and 320-square-feet of interior public access (Bayside History Walk) by a recorded legal instrument; (3) failure to install public access improvements, including six benches, two trash receptacles, two public access signs, approximately 15 bollards, one "No Bus Parking" sign and one directional Bayside History Walk sign; (4) failure to install Bayside History Walk improvements, including interpretive amenities and two Bayside History signs; (5) failure to organize, administer, and staff an outreach program to provide nonprofit, charitable organizations with four complimentary charters for 50 guests at a time on a quarterly basis and to provide yearly monitoring reports documenting these efforts; and (6) failure to submit and receive approval for flags, banners, and signs hanging on the pier shed.

Since November 2006, BCDC staff has worked with Mr. O'Doherty to resolve the alleged violations, but significant fines have accrued. In May 2007, BCDC staff worked with Mr. O'Doherty to organize an outreach program. The outreach program was approved on November 26, 2007, but the alleged violation took 361 days to resolve. On May 3, 2007, BCDC staff received approvable plans to hang specific flags and banners on Pier 9, resolving this alleged violation within 154 days. In April 2008, Mr. O'Doherty installed the required bollards 487 days after the alleged violation began. In June 2008, Mr. O'Doherty installed the required public access and Bayside History Walk signs approximately 516 days after the alleged violation began. On April 29, 2008, public access plans were approved, 516 days after the alleged violation began. On July 17, 2008, the public access instrument was approved, 662 days after the alleged violation began.

Several violations remain and have accrued additional civil penalties including the failure to submit Bayside History Walk plans and install the improvements, and the failure to install the remaining public access improvements, including six benches, two trash receptacles, and one "No Bus Parking" sign.

Mr. O'Doherty met with Mr. Will Travis, BCDC Executive Director, and BCDC staff on April 10, 2008 to discuss Pacific Marine Yachts' alleged violations and fines that have accrued since November 30, 2006. Mr. O'Doherty agreed to comply with all of the permit requirements by May 1, 2008, except the installation of the Bayside History Walk improvements due to the threat of vandalism. However, Mr. O'Doherty failed to meet the May 1, 2008 deadline. To encourage Pacific Marine Yachts to complete the project on May 1, 2008, Mr. Travis told Mr. O'Doherty that BCDC staff would prepare a Stipulated Cease and Desist Order and require the payment of a \$30,000 civil penalty.

Pursuant to Commission Regulation Section 11386, BCDC staff has determined that \$128,500 in total civil penalties have accrued for the alleged violations, including: (1) \$8,900 for failing to secure BCDC staff approval for the advertising banner program for 154 days after BCDC's November 30, 2006 enforcement letter; (2) \$29,600 for failing to secure BCDC staff approval for the outreach program for 361 days after BCDC's November 30, 2006 enforcement letter; (3) \$30,000 for failing to submit the public access and Bayside History Walk plans (maximum fines accrued 365 days after BCDC's November 30, 2006 enforcement); (4) \$30,000 for failing to install

all public access improvements (maximum fines accrued 365 days after BCDC's November 30, 2006 enforcement letter); and (5) \$30,000 for failing to submit an acceptable public access instrument (maximum fines accrued 365 days after BCDC's November 30, 2006 enforcement letter).

These fines are authorized under California Government Code Section 66641.5(e), which provides that a civil penalty "may be administratively imposed by the Commission...in an amount which shall be not less than ten dollars (\$10), nor more than two thousand dollars (\$2,000), for each day in which that violation occurs or persists, but the Commission may not administratively impose a fine of more than thirty thousand dollars (\$30,000) for a single violation."

In order to resolve the enforcement issues without further delay, expense and uncertainty, and in view of efforts by Pacific Marine Yachts to comply with some of the permit conditions, the staff and Mr. O'Doherty have agreed to the proposed Cease and Desist and Civil Penalty Order No. CCD 2-08. The staff and Mr. O'Doherty recommend that the Commission approve and issue the order.

Summary of Proposed Order

Under the Order, Pacific Marine Yachts agrees to do the following:

1. By October 31, 2008, on the north side of the Pier 9 pier shed, install four benches, one trash receptacle, a directional public access sign, and a "No Bus Parking" sign;
2. By October 31, 2008, on the south side of the Pier 9 pier shed, install two benches, one trash receptacle, and one directional public access sign;
3. By October 31, 2008, install two Bayside History Walk signs stating that the breezeway and public access to inside Pier 9 are open and available from 8AM to 6PM on the left side of the breezeway entrance on the south side of the pier shed and on the main entrance to the pier shed on the west side of the shed;
4. By October 31, 2008, obtain staff approval for a Bayside History Walk plan that includes the location of the amenities and artwork based on historic San Francisco waterfront photographs, construction details for these amenities, a public access pathway through the pier shed, and the location of directional signage;
5. By October 31, 2008, obtain staff approval for a public access instrument that guarantees approximately 2,940 square feet of exterior public access and 320 square feet of interior public access (Breezeway), and record the public access instrument and submit the recorded instrument to BCDC within 30 days of approval of the instrument by BCDC counsel;
6. Within 45 days after the Port of San Francisco completes the installation of a door on each side of the breezeway at Pier 9, install the Bayside History Walk amenities and artwork based on historic San Francisco waterfront photographs;

7. Provide yearly reports, on or before May 1 of each year, of charter donations given to charitable organizations that specify: (a) the organizations that received the quarterly charters for 50 guests; and (b) whether the receiving organizations used the charters. Pacific Marine Yachts and the responsible officer of each receiving organization must sign the report;
8. To compensate for the complimentary charters that were not provided from 2001 to 2006, by September 11, 2009, provide four additional cruises to those required in Special Condition II-B-11 that give 1,000 members of charitable organizations in the community approved by BCDC staff a complimentary charter; and
9. By October 31, 2008, submit a cashier's check in the amount of \$30,000, payable to BCDC. Pacific Marine Yachts agrees to pay to the Commission a total fine of \$128,500, which BCDC staff determined has accrued for all alleged violations under Government Code 66641.5(e), for failure to pay the \$30,000 civil penalty on or before October 31, 2008, or for subsequent violations of the McAteer-Petris Act or any provision of BCDC Permit No. 15-00.

Staff Recommendation

The staff concludes that the Order would fairly resolve the alleged violations because of the public access and Bayside History Walk improvements and additional benefits to the public that will be provided for the loss of public access since 2001.

The staff also concludes that a civil penalty of \$30,000, with the entire \$128,500 amount stayed but due if Pacific Marine Yachts does not comply with any term or condition of the Order, is fair and reasonable.

For the reasons stated above, the staff recommends that the Commission adopt this report and issue Commission Stipulated Cease and Desist and Civil Penalty Order No. CCD 2-08.

Attached to this memorandum are the following documents: (1) the staff recommendation (Attachment One); (2) the Order with exhibits including the permit and a site plan (Attachment Two); and (3) the Stipulation to the Order by Mr. O'Doherty (Attachment Three).